UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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PABLO VALERIO CHOPEN,

Plaintiff,

- against -

OLIVE VINE, INC. a/k/a OLIVE VINE CAFÉ, ZAID DEMIS, WILLIAM DOE AND MEHAM DOE,

Defendants.

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REPORT AND RECOMMENDATION

CV 2012-2269 (NGG)(MDG)

TO: THE HONORABLE NICHOLAS G. GARAUFIS:

Plaintiff Pablo Valerio Chopen seeks recovery of unpaid minimum and overtime wages from defendants Olive Vine, Inc. a/k/a Olive Vine Café, Zaid Demis, William Doe and Meham Doe (collectively "defendants") under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., as well as pendent state claims under the New York Labor Law ("Labor Law"), N.Y. Lab. Law, Art. 19 §§ 650 et seq. After the Honorable Nicholas G. Garaufis adopted my report and recommendation that the answers of defendants be stricken and default be entered against them, Judge Garaufis referred to me any subsequent request for damages and other relief.

PERTINENT FACTS

The following facts adduced from the Complaint and plaintiff’s submissions are undisputed and are taken as true for purposes of deciding this motion. See Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 158 (2d Cir. 1992) (citations omitted).

From on or about October 2007 until February 19, 2012, plaintiff worked as a dishwasher and bicycle delivery person at defendant Olive Vine, Inc. a/k/a Olive Vine Café ("Olive Vine") in Brooklyn, New York. Complaint ("Compl.") (ct. doc. 1) at ¶¶ 7, 14; Declaration of Valerio Pablo Chopen ("Chopen Decl.") (ct. doc. 23) at ¶ 2. Plaintiff generally worked Monday through Saturday, from 11 a.m. to 11 p.m., or 72 hours per week, but plaintiff worked from 11:30 a.m. to 11 p.m., or 69 hours per week, during December, January and February. Compl. at ¶ 18; Chopen Decl. at ¶ 3. Plaintiff was not permitted to have a lunch break. Chopen Decl. at ¶ 7.

Defendant Zaid Demis is the owner and founder of Olive Vine, and defendant William Doe and Meham Doe are the co-owners of Olive Vine since about June 1, 2011. Compl. at ¶¶ 24, 32. Throughout plaintiff's employment, defendant Zaid Demis exercised significant managerial control over Olive Vine's operation and employees from October 2007 February 12, 2012, and defendants William Doe and Meham Doe exercised such managerial control from about June 1, 2011 through February 19, 2012.[1] Id. at ¶ 45; see also id. at ¶¶ 25-39.

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[1] In their stricken answer, the individual defendants admitted that "during the times mention[ed]" in the complaint, they "had managerial responsibility for the corporate defendant." Answer (ct. doc. 6) at ¶ 1.

Defendants paid plaintiff a flat weekly cash wage of $240 per week from October 2007 to June 2011, $280 per week from June 2011 to October 2011 and $320 per week from October 2011 to February 19, 2012. Id. at ¶¶ 8-10. Defendants never notified plaintiff that the tips he received would be credited against the minimum wage rate. Id. at ¶ 14. Defendants never gave plaintiff any earning statement or other documentation indicating the basis for his wages or how they were calculated. Id. at ¶ 5. Defendants never paid plaintiff for an additional hour at the minimum wage rate for each day that he worked longer than 10 hours. Id. at ¶ 12.

PROCEDURAL BACKGROUND

Plaintiff commenced this action on May 8, 2012. See Compl. Following an extension of time, defendants filed an answer on September 14, 2012. See Answer. Although defendants failed to file a timely answer, counsel purporting to act on their behalf contacted plaintiff's counsel, who consented to extend defendants' time to answer. See status report dated 8/27/12 (ct. doc. 5). This Court held an initial conference on October 10, 2012 at which John M. Wilson, counsel for defendants, appeared. See minute entry for 10/10/2012. Mr. Wilson participated at a further conference on November 14, 2012, but did not appear at any other scheduled conferences. See minute entries dated 11/14/2012, 2/20/2013, 3/11/2013 and 5/3/13. Defendants also failed to provide discovery, even after being ordered to do so.

See ct. doc. 13 (minute order dated 3/11/15 granting plaintiff's motion to compel).

This Court then issued a report and recommendation that default be entered against the defendants. See report and recommendation filed 8/22/2013 (ct. doc. 15). Adopting the report and recommendation in full on January 15, 2014, Judge Garaufis referred to me the question of damages. See order adopting report and recommendations filed 1/15/2014 (ct. doc. 18). Plaintiff then filed a motion for default judgment, which he supported with a declaration of plaintiff Valerio Pablo Chopen and a declaration of Scott Lucas, plaintiff's counsel ("Lucas Decl.). See ct. docs. 22, 23, 24, 25.

DISCUSSION

I. Governing Legal Standards

A defendant's default is an admission of all well-pleaded factual allegations in the complaint except those relating to damages. See Greyhound, 973 F.2d at 158; Au Bon Pain Corp. v. Artect, Inc., 653 F.2d 61, 65 (2d Cir. 1981). A default also effectively constitutes an admission that damages were proximately caused by the defaulting party's conduct; that is, the acts pleaded in a complaint violated the laws upon which a claim is based and caused injuries as alleged. See Greyhound, 973 F.2d at 159. The movant needs prove "only that the compensation sought relate[s] to the damages that naturally flow from the injuries pleaded." Id.

The court must ensure that there is a reasonable basis for the damages specified in a default judgment. The court has the discretion to require an evidentiary hearing or to rely on detailed affidavits or documentary evidence in making this determination. See Action S.A. v. Marc Rich and Co., Inc., 951 F.2d 504, 508 (2d Cir. 1991) (quoting Fustok v. ContiCommodity Servs., Inc., 873 F.2d 38, 40 (2d Cir. 1989)); Chun Jie Yin v. Kim, No. 07-CV-1236, 2008 WL 906736, at *2 (E.D.N.Y. Apr. 1, 2008) (collecting cases); Fed. R. Civ. P. 55(b)(2). The moving party is entitled to all reasonable inferences from the evidence it offers. See Finkel v. Romanowicz, 577 F.3d 79, 84 (2d Cir. 2009); Au Bon Pain, 653 F.2d at 65 (citing TWA, Inc. v. Hughes, 308 F. Supp. 679, 683 (S.D.N.Y. 1969)).

II. Liability

Plaintiff brings claims under the FLSA alleging that defendants violated sections 206 and 207 of the statute and claims under the New York Labor Law.

A. FLSA claims

The FLSA was enacted by Congress "to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.'" Barrentine v. Arkansas-Best Freight Sys. Inc., 450 U.S. 728, 739 (1981) (quoting 29 U.S.C. § 202(a)) (footnote omitted). Section 206 of the FLSA sets forth a minimum hourly wage employers must pay their employees who engage in work affecting interstate commerce. 29 U.S.C. § 206(a)(1)(C). Section 207 specifies that an employer must pay employees who work in excess of forty hours during a workweek for the excess hours "at a rate not less than one and one-half times the regular rate at which he is employed." Id. § 207(a)(1). Employers in violation of this provision "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." Id. § 216(b).

In addition, section 211(c) of the FLSA requires that covered employers "make, keep and preserve . . . records" of their employees with respect to "wages, hours, and other conditions and practices of employment" for a certain period of time. Id. § 211(c). The information that must be kept in these records is set forth in 29 C.F.R. § 516.2(a)(1)-(12).[2] Section 215(a)(5) of the FLSA makes it unlawful for any employer covered under the statute to violate any of these record-keeping provisions. See 29 U.S.C. § 215(a)(5).

1. Interstate Commerce Requirement

As a preliminary matter, a plaintiff in an FLSA action must establish that the defendants are "employers" and that the employer is engaged in "interstate commerce." See 29 U.S.C.

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[2] Such regulations "have the force of law, and are to be given controlling weight unless they are found to be arbitrary, capricious, or manifestly contrary to statute." Freeman v. Nat'l Broadcasting Co., 80 F.3d 78, 82 (2d Cir. 1996) (citations omitted).

§ 206(b), 203(s). Plaintiff alleges in the complaint that defendants' employees handled goods or materials moved in or produced for interstate commerce and gross sales were at least $500,000. Compl. at ¶¶ 50-52. These allegations are sufficient to satisfy the interstate commerce requirement. See Smith v. Nagai, No. 10-CV-8237, 2012 WL 2421740, at *2 (S.D.N.Y. May 15, 2012) (finding that restaurant's purchase of food out of state satisfied interstate commerce requirement).

2. Employer

The FLSA broadly defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(a). Plaintiff has established that the defendants operated Olive Vine where plaintiff worked and that all defendants had control over the terms and conditions of plaintiff's employment. See Compl. at ¶ 45; see also id. at ¶¶ 25-39. Therefore, all the defendants are employers subject to FLSA liability.

3. Sufficiency of Allegations

Plaintiff alleges in his complaint that defendants did not pay him the proper minimum wage and overtime compensation. Specifically, plaintiff alleges that he worked 72 hours per week at Olive Vine from October 2007 to February 19, 2012 and was paid $240 per week from the beginning of his employment until June 2011, when his pay increased to $280 per week until October 2011. Compl. at ¶¶ 14, 18-21. Supplementing the allegations in the complaint, plaintiff has provided additional details in the declarations he submitted in support of his damages submissions. In his declaration, plaintiff stated that defendants paid him a weekly cash wage of $240 per week from October 2007 to June 2011, $280 per week from June 2011 to October 2011 and $320 per week from October 2011 to February 19, 2012. Chopen Decl. at ¶¶ 8-10. Plaintiff also states that he generally worked 72 hours per week, but worked 69 hours per week during December, January and February. Id. at ¶ 3. Plaintiff was never notified that the tips he received would be credited against the minimum wage rate. Id. at ¶ 14. Nor was he paid any overtime compensation for working more than 40 hours per week. Id. at ¶ 11. These facts are sufficient to state a plausible claim under the FLSA.

Based on the undisputed allegations in the complaint, I recommend finding defendants liable for violation of the minimum wage provisions and overtime provisions of the FLSA.

B. New York Labor Law

New York's Labor Law is the state analogue to the federal FLSA. Although the Labor Law "does not require a plaintiff to show either a nexus with interstate commerce or that the employer has any minimum amount of annual sales," it otherwise mirrors the FLSA in compensation provisions regarding minimum hourly wages. Chun Jie Yin, 2008 WL 906736, at *4; see N.Y. Lab. Law § 652 (minimum hourly wage); N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.1(a)(1) (same); id. §142-2.2 (same method as employed in the FLSA for calculating overtime wages). One notable difference in New York law is a "spread of hours" provision which allows a plaintiff to recover an extra hour's worth of pay at the minimum wage for each day that an employee works in excess of ten hours. N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.4.

For the reasons discussed above, the allegations in the complaint are sufficient to impose liability on defendants under the Labor Law. See Debejian v. Atl. Testing Labs., Ltd., 64 F. Supp. 2d 85, 87 n.1 (N.D.N.Y. 1999) (finding New York Labor Law provisions "substantially similar to the federal scheme" such that its analysis of federal law would apply equally to claims brought under the FLSA and New York law). Furthermore, the Court finds that plaintiff is entitled to recover "spread of hours" pay under the Labor Law based upon the undisputed allegations that he regularly worked over 10 hours but was not given an extra hour's worth of wages at minimum wage for those days. See Chopen Decl. at ¶¶ 3, 12.

C. Unidentified Doe Defendants' Liability

After over two years since the filing of the complaint, plaintiff still has not amended the complaint to identify defendants William Doe and Meham Doe. See Compl. Accordingly, I recommend dismissing defendants William Doe and Meham Doe from this action without prejudice pursuant to Fed. R. Civ. P. 21, which permits this Court to drop parties on its own initiative "at any time, on just terms." See Microsoft Corp. v. Atek 3000 Computer Inc., No. 06-CV-6403, 2008 WL 2884761, at *1 & n.1 (E.D.N.Y. July 23, 2008) (dismissing unidentified defendants pursuant to Fed. R. Civ. P. 21); Brown v. Tomcat Elec. Sec., Inc., No. 03-CV-5175, 2007 WL 2461823, at *1 & n.1 (E.D.N.Y. Aug. 27, 2007) (dismissing FLSA claim against unidentified Doe defendants). The remaining defendants in this action are defendants Olive Vine and Zaid Demis, and they are jointly and severally liable to plaintiff, as discussed below.

III. Damages

A. Damages Period

Plaintiff was employed by defendants from October 2007 until February 19, 2012. Compl. at ¶ 14; Chopen Decl. at ¶ 2. The limitations period for claims brought under the FLSA is two years, but for willful violations, the period is three years. See 29 U.S.C. § 255(a). To demonstrate willfulness, plaintiff must show that the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988); Young v. Cooper Cameron Corp., 586 F.3d 201, 207 (2d Cir. 2009). Generally, courts have found that a defendant's default is tantamount to an admission of allegations of willfulness. See Hernandez v. PKL Corp., No. 12–CV–2276, 2013 WL 5129815, at *2 (E.D.N.Y. Sept. 12, 2013); Rodriguez v. Queens Convenience Deli Corp., No. 09–CV–1089, 2011 WL 4962397, at *2 (E.D.N.Y. Oct. 18, 2011). Plaintiff alleges defendants' violations were willful. Compl. at ¶¶ 57, 58. In addition, plaintiff alleges that defendants approved and authorized the practice of not paying the applicable minimum wage and overtime compensation. Id. at ¶¶ 31,

36. Defendants also paid plaintiff "off the books." Id. at ¶¶ 29, 37. These allegations are sufficient to support a finding of willfulness to trigger application of the longer three year FLSA limitations period. Therefore, I recommend awarding plaintiff damages under the FLSA for conduct occurring since May 8, 2009, three years before the filing of the complaint.

Claims brought under the New York Labor Law are subject to a six year limitations period. N.Y. Labor Law § 198(3), 663(3). Thus, plaintiff is entitled to recover damages during the six years that preceded May 8, 2012 or the filing of the complaint. However, although plaintiff alleges in his complaint and damages submissions that he was employed from October 2007 until February 19, 2012, the charts attached as exhibits contain calculations for damages from August 2007. Since there is no evidence that plaintiff was employed by defendants prior to October 2007, I recommend awarding plaintiff damages under New York Labor Law from October 2007 to February 19, 2012.

B. Recoverable Damages

Under the FLSA, plaintiffs who prevail under section 206 are entitled to "the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). As discussed above, the New York Labor Law mirrors the FLSA in terms of compensating for minimum wage and overtime wage violations. In addition to the liquidated damages that may be awarded under the FLSA, see 29 U.S.C. § 216(b), liquidated damages are available under New York law. N.Y. Lab. Law § 663.

In calculating damages, this Court relies on the submissions of plaintiff and has not required a hearing. The Second Circuit has expressly endorsed this approach so long as the court has "'ensured itself that there was a basis for the damages specified in the default judgment.'" Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., 109 F.3d 105, 111 (2d Cir. 1997) (quoting Fustok, 873 F.2d at 40). Plaintiff has submitted a sworn declaration containing information as to hours worked and rates of pay based on estimate and recollection. Since the defendants have failed to dispute plaintiff's allegations, I find that plaintiff has provided a sufficient basis for determination of damages.

Generally, an employee-plaintiff under the FLSA "has the burden of proving that he performed work for which he was not properly compensated." Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946), superseded on other grounds by The Portal-to-Portal Act of 1947, 29 U.S.C. § 251, et seq. As the Supreme Court recognized in Anderson, "employees seldom keep . . . records [of hours worked] themselves; even if they do, the records may be and frequently are untrustworthy." Id. Therefore, the easiest way for an FLSA plaintiff to discharge his or her burden of proof is to "secur[e] the production of those records" from the employer, who has the duty to maintain such records under section 11(c) of the FLSA. Id. However, by defaulting, defendants have deprived plaintiff of the necessary employee records required by the FLSA, thus hampering plaintiff's ability to prove his damages.

In addressing the problem of proof faced by employees, the Supreme Court in Anderson held that "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." Id. As courts have found, a plaintiff can meet this burden "by relying on recollection alone." Doo Nam Yang v. ACBL Corp., 427 F. Supp. 2d 327, 335 (S.D.N.Y. 2005); see also Kuebel v. Black & Decker Inc., 643 F.3d 352, 362 (2d Cir. 2011); Padilla v. Manlapaz, 643 F. Supp. 2d 302, 307 (E.D.N.Y. 2009); Park v. Seoul Broad. Sys. Co., No. 05-CV-8956, 2008 WL 619034, at *7 (S.D.N.Y. Mar. 6, 2008); Chan v. Sung Yue Tung Corp., No. 03-CV-6048, 2007 WL 313483, at *24 (S.D.N.Y. Feb. 1, 2007). "In the absence of rebuttal by defendants," Chen v. Jenna Lane, Inc., 30 F. Supp. 2d 622, 625 (S.D.N.Y. 1998), or "[w]here the employer has defaulted, [as here, the employee's] recollection and estimates of hours worked are presumed to be correct." Pavia v. Around the Clock Grocery, Inc., No. 03-CV-6465, 2005 WL 4655383, at *5 (E.D.N.Y. Nov. 15, 2005); see also Harold Levinson Assocs., Inc. v. Chao, 37 Fed. App'x 19, 20 (2d Cir. 2002). "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with [the FLSA's record-keeping provisions]."

Anderson, 328 U.S. at 688.

New York law goes one step further and requires that employers who fail to maintain the appropriate records "bear the burden of proving that the complaining employee was paid wages, benefits and wage supplements." N.Y. Lab. Law § 196-a; see Padilla, 643 F. Supp. 2d at 307. With this framework in mind, the Court proceeds to its calculation of damages.

C. Determination of Damages

1. Regular Hourly Rate

In order to calculate damages, the court must first determine the "regular hourly rate" received by plaintiff. See 29 U.S.C. § 207(a)(1). Generally, the regular hourly rate "is determined by dividing the total renumeration in any workweek by the total number of hours actually worked . . . ." 29 C.F.R. § 778.109. "If the employee is employed solely on a weekly basis, the regular hourly rate of pay on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate." 29 C.F.R. § 778.113. The regular rate of pay "must be drawn from what happens under the employment contract." 29 C.F.R. § 778.108; see Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 464 (1948).

Plaintiff calculated the regular hourly rate based on the assumption that the weekly salary received by plaintiff compensates only the first 40 hours worked per week. Plaintiff relies on several district court cases in this Circuit that have found that "[a]bsent an agreement that the contracting parties understand the weekly salary to include overtime hours at the premium rate, courts have found that a weekly salary covers 40 hours." See Said v. SBS Elecs., Inc., 2010 WL 1265186, at *7 (E.D.N.Y. 2010) (citing Giles v. City of New York, 41 F. Supp. 2d 308, 317 (S.D.N.Y. 1999)); Berrios v. Nicholas Zito Racing Stable, Inc., 849 F. Supp. 2d 372, 387 (E.D.N.Y. 2012). However, the cases cited by plaintiff are distinguishable. In Said, the plaintiff's work hours fluctuated between 65 and 84 hours per week but he was paid the same weekly salary regardless of his hours. In Berrios, defendants argued that plaintiffs' weekly salary included an overtime premium for time and one half for the hours worked over 40.

Here, in contrast, although plaintiff states that there was no agreement between him and the defendants as to how many hours his weekly salary was intended to cover, throughout his employment, plaintiff worked the same number of hours each week -- from March through November plaintiff worked 72 hours per week and from December through February plaintiff worked 69 hours per week. "In the absence of any written instrument memorializing the parties' intentions, the Court must infer the terms of their agreement from the entire course of their conduct, based on the testimonial and documentary evidence in the record." Moon v. Kwon, 248 F. Supp. 2d 201, 206 (S.D.N.Y. 2002). Moreover, there is no claim here that plaintiff's weekly salary included an overtime premium. Under these circumstances, it is reasonable to infer that the parties intended for plaintiff's weekly salary to

include straight time pay for each hour worked. See, e.g., Peralta v. M & O Iron Works, Inc., No. 12-CV-3179, 2014 WL 988835, at *8 (E.D.N.Y. Mar. 12, 2014) (calculating plaintiff's regular hourly rate based on a 56-hour workweek because plaintiff regularly worked 56 hours per week); Man Wei Shiu v. New Peking Taste Inc., No. 11–CV–1175, 2014 WL 652355, at *12 (E.D.N.Y. Feb. 19, 2014) (calculating plaintiffs' regular hourly rate based on a 67 hour workweek and rejecting plaintiff's calculations based on a 40 hour workweek); Llolla v. Karen Gardens Apartment Corp., No. 12-CV-1356, 2014 WL 1310311, at *10 (E.D.N.Y. March 10, 2014); Hernandez v. P.K.L. Corp., No. 12-cv-2276, 2013 WL 5129815, at *4 (E.D.N.Y. Sept. 12, 2013). Therefore, I recommend calculating plaintiff's regular hourly rate by dividing his weekly salary by the number of hours that he worked that week. Based on the above discussion, plaintiff's regular hourly rate ranged from $3.33 per hour to $4.64 per hour during his employment by defendants.

2. Minimum Wages

Plaintiff is entitled to damages for having been paid less than the prevailing minimum wage from October 2007 to February 19, 2012. An employee gets the benefit of the higher of the applicable federal or state minimum wage. See 29 U.S.C. § 218(a); N.Y. Lab. Law § 652(1). During plaintiff's period of employment, the New York minimum wage was higher or the same as the federal minimum wage as follows: October 2007 through July 23, 2009 - $7.15 per hour; July 24, 2009 through February 19, 2012 - $7.25 per hour. See N.Y.L.L. § 652(1); 29 U.S.C.

§ 206(a).

Plaintiff acknowledges that he received tips as part of his income. The FLSA permits employers to pay tipped employees an hourly rate below the minimum wage if the employee's wages and tips, added together, meet or exceed the minimum wage. See 29 U.S.C. § 203(m). In order to benefit from the tip credit, the employer must first notify the employees of its intention to include tip income when calculating wages actually paid and all such tips must have been retained by the employee. See 29 U.S.C. § 203(m); 29 C.F.R. § 531.59(b); Cao v. Wu Liang Ye Lexington Rest., Inc., No. 08-CV-3725, 2010 WL 4159391, at *2 (S.D.N.Y. Sept. 30, 2010); Yu G. Ke v. Saigon Grill, Inc., 595 F. Supp. 2d 240, 254 (S.D.N.Y. 2008). Plaintiff states in his declaration that he was not notified by his employers that tips would be calculated against his wages. See Chopen Decl. at ¶ 14. Thus, plaintiff is entitled to recover damages for unpaid minimum wages based only on the regular wages he received.

As previously discussed, I recommend that plaintiff's regular hourly rate be calculated by dividing his weekly salary by the hours he worked. See 29 C.F.R. §§ 778.109, 778.113. He is thus entitled to recover unpaid wages for the difference between the minimum wage rate in effect and the hourly rate he was actually paid for all hours worked.

For the weeks ending October 7, 2007 through July 19, 2009, plaintiff was paid an hourly rate of $3.33 when he worked 72 hours a week in the months of March through November ($240 per week / 72 hours) and an hourly rate of $3.48 when he worked 69 hours a week in the other months ($240 per week / 69 hours). For this time period, plaintiff worked 4,968 hours (72 hours x 69 weeks) at the hourly rate of $3.33 and 1,725 hours (69 hours x 25 weeks) at the hourly rate of $3.48. Since the applicable minimum wage during this period was $7.15 per hour, plaintiff is entitled to unpaid minimum wages of $18,977.76 ($3.82 x 4,968 hours) and $6,330.75 ($3.67 x 1,725 hours), respectively.

For the weeks ending July 26, 2009 through June 5, 2011, plaintiff worked 5,112 hours (72 hours x 71 weeks) at the hourly rate of $3.33 and 1,794 hours (69 hours x 26 weeks) at the hourly rate of $3.48. Since the applicable minimum wage during this and subsequent relevant periods was $7.25 per hour, plaintiff is entitled to $20,039.04 ($3.92 x 5,112 hours) and $6,763.38 ($3.77 x 1,794 hours), respectively. For the weeks ending June 12, 2011 through October 2, 2011, plaintiff worked 1,224 hours (72 hours x 17 weeks) at the hourly rate of $3.89 ($280 per week / 72 hours) and is entitled to unpaid minimum wages of $4,112.64 ($3.36 x 1,224 hours). For the weeks ending October 9, 2011 through February 19, 2012, plaintiff worked 648 hours (72 hours x 9 weeks) at the hourly rate of $4.44 ($320 per week / 72 hours) and 828 hours (69 hours x 12 weeks) at the hourly rate of $4.64 ($320 per week / 69 hours). Thus, plaintiff is entitled to $1,820.88 ($2.81 x 648 hours) and $2,161.08 ($2.61 x 828 hours), respectively, for unpaid minimum wages in this time period.

An offset to unpaid minimum wages is warranted since plaintiff states that he took at most 3 personal days per year and adjusted his calculations of wages due accordingly. See Chopen Decl. at ¶ 16; Lucas Decl., Ex. 1 (ct. doc. 24-1). Plaintiff calculated the offset by taking the average value of plaintiff's claim for each day worked, and then multiplying the number of days off. See id. For purposes of an offset to minimum wages due, plaintiff worked 4.4 years (229 weeks / 52 weeks per year), and therefore the presumed number of days off (rounded to the nearest whole day) is 13 days (4.4 years x 3 days per year). The average value of plaintiff's minimum wage claim for each day is $43.82 ($60,205.53 / 1,374 days). Thus, the offset for minimum wages claim is $569.66 ($43.82 x 13 days).

Plaintiff's unpaid minimum wages are summarized below:

MINIMUM WAGES OWED				
Period (week ending date)	Differential between minimum wage and plaintiff's hourly wage	Number of Weeks	Number of Hours per Week	Minimum Wages Owed
10/07/07 to 11/25/07	$7.15 - $3.33 = $3.82	8 weeks	72 hours	$ 2,200.32
12/02/07 to 02/24/08	$7.15 - $3.48 = $3.67	13 weeks	69 hours	$ 3,291.99
03/02/08 to 11/30/08	$7.15 - $3.33 = $3.82	40 weeks	72 hours	$11,001.60
12/07/08 to 02/22/09	$7.15 - $3.48 = $3.67	12 weeks	69 hours	$ 3,038.76
03/01/09 to 07/19/09	$7.15 - $3.33 = $3.82	21 weeks	72 hours	$ 5,775.84
07/26/09 to 11/29/09	$7.25 - $3.33 = $3.92	18 weeks	72 hours	$ 5,080.32
12/06/09 to 02/28/10	$7.25 - $3.48 = $3.77	13 weeks	69 hours	$ 3,381.69
03/07/10 to 11/28/10	$7.25 - $3.33 = $3.92	39 weeks	72 hours	$11,007.36
12/05/10 to 02/27/11	$7.25 - $3.48 = $3.77	13 weeks	69 hours	$ 3,381.69
03/06/11 to 06/05/11	$7.25 - $3.33 = $3.92	14 weeks	72 hours	$ 3,951.36
06/12/11 to 10/02/11	$7.25 - $3.89 = $3.36	17 weeks	72 hours	$ 4,112.64
10/09/11 to 11/27/11	$7.25 - $4.44 = $2.81	9 weeks	72 hours	$ 1,820.88
12/04/11 to 02/19/12	$7.25 - $4.64 = $2.61	12 weeks	69 hours	$ 2,161.08
SUBTOTAL				$60,205.53
OFFSET				$ 569.66
TOTAL				$59,635.87

Therefore, I recommend awarding plaintiff $59,635.87 for total unpaid minimum wages.

3. Overtime Wages

Plaintiff also seeks overtime wages since he was not paid time and one-half for those hours he worked over 40 hours during a given week. See Chopen Decl. at ¶ 11. Since plaintiff claims that he worked 72 or 69 hours for his entire employment, he is entitled to overtime wages each week. See Chopen Decl. at ¶ 3. Having already calculated the minimum wage due for each hour worked, I calculate one-half of the prevailing minimum wage as plaintiff's unpaid overtime wage for hours worked in excess of 40 hours in a week.

An offset to overtime compensation is also warranted for the three personal days plaintiff took each year, as discussed above. See Chopen Decl. at ¶ 16; Lucas Decl., Ex. 1. The average value of plaintiff's overtime wages claim for each day is $18.76 ($25,777.04 / 1,374 days). Thus, the offset for overtime wages for 13 personal days is $243.88 ($18.76 x 13 days).

Plaintiff's unpaid overtime wages are summarized below:

OVERTIME WAGES OWED				
Period (week ending date)	OT not paid (½ of minimum wage rate)	Number of Weeks	Number of OT Hours per Week	OT Wages Owed
10/07/07 to 11/25/07	$3.575	8 weeks	32 hours	$ 960.00
12/02/07 to 02/24/08	$3.575	13 weeks	29 hours	$ 1,347.78
03/02/08 to 11/30/08	$3.575	40 weeks	32 hours	$ 4,576.00
12/07/08 to 02/22/09	$3.575	12 weeks	29 hours	$ 1,244.10
03/01/09 to 07/19/09	$3.575	21 weeks	32 hours	$ 2,402.40
07/26/09 to 11/29/09	$3.625	18 weeks	32 hours	$ 2,088.00
12/06/09 to 02/28/10	$3.625	13 weeks	29 hours	$ 1,366.63
03/07/10 to 11/28/10	$3.625	39 weeks	32 hours	$ 4,524.00
12/05/10 to 02/27/11	$3.625	13 weeks	29 hours	$ 1,366.63
03/06/11 to 06/05/11	$3.625	14 weeks	32 hours	$ 1,624.00
06/12/11 to 10/02/11	$3.625	17 weeks	32 hours	$ 1,972.00
10/09/11 to 11/27/11	$3.625	9 weeks	32 hours	$ 1,044.00
12/04/11 to 02/19/12	$3.625	12 weeks	29 hours	$ 1,261.50
SUBTOTAL				$25,777.04
OFFSET				$ 243.88
TOTAL				$25,533.16

Therefore, I recommend awarding plaintiff $25,533.16 for total unpaid overtime wages.

4. Spread of Hours Pay Under New York Labor Law

Plaintiff requests an award for "spread of hours" pay under New York Labor Law. N.Y. Comp. Codes R. & Regs. tit. 12 § 142-2.18. On those days when the interval between the beginning and end of an employee's workday exceeds 10 hours, New York law requires that the employee "receive one hour's pay at the basic minimum hourly wage rate." Id. § 142-2.4; see, e.g., Pavia, 2005 WL 4655383, at *8 (awarding spread of hours pay). Plaintiff regularly worked 11½ to 12 hours per day for 6 days per week during his entire period of employment. See Compl. at ¶ 18; Chopen Decl. ¶ 3. Plaintiff worked 94 weeks, or 564 days, when the state minimum wage was $7.15 per hour, and another 135 weeks, or 810 days, when the state minimum wage was $7.25 per hour. See Chopen Decl., Ex. 5. Thus, plaintiff is entitled to spread of hours pay in the amount of $9,905.10 (564 days x $7.15 + 810 days x $7.25).

Plaintiff's spread of hours pay must also be offset by 3 personal days per year. The average value of plaintiff's spread of hours pay claim for each day is $7.21 ($9,905.10 / 1,374 days). Thus, the offset for spread of hours pay claim is $93.73 ($7.21 x 13 days).

Therefore, I recommend awarding plaintiff $9,811.37 for spread of hours pay.

5. Liquidated Damages

Plaintiff also seeks liquidated damages under both the FLSA and New York Labor Law. However, the FLSA's three-year statute of limitations for willful violations limits plaintiff's recovery of liquidated damages to three years before the complaint filing date. See 29 U.S.C. § 255(a). Thus, since this lawsuit was filed on May 8, 2012, the FLSA liquidated damages provision only applies from May 8, 2009, until the end of plaintiff's employment on February 19, 2012. Liquidated damages under the FLSA are "compensation to the employee occasioned by the delay in receiving wages caused by the employer's violation of the FLSA." Herman v. RSR Secs. Servs., Ltd., 172 F.3d 132, 141-42 (2d Cir. 1999); see Irizarry v. Catsimatidis, 722 F.3d 99, 116 (2d Cir. 2013) (noting that liquidated damages under the FLSA are not penalties). In contrast, "liquidated damages under the Labor Law 'constitute a penalty,' to deter an employer's willful withholding of wages due." Reilly v. Natwest Mkts. Group Inc., 181 F.3d 253, 265 (2d Cir. 1999).

District courts in this circuit are divided as to whether overlapping liquidated damages awards are available under the FLSA and the New York Labor Law. The majority view is that plaintiffs may recover liquidated damages under both statutes because each award serves fundamentally different purposes. See Sanchez v. Viva Nail N.Y. Inc., No. 12–CV–6322, 2014 WL 869914, at *5 (E.D.N.Y. Mar. 5, 2014); Maliza v. 2001 MAR-OS Fashion, Inc., No. 07-CV-463, 2010 WL 502955, at *1 & n.4 (E.D.N.Y. Feb.

10, 2010); Yu G. Ke, 595 F. Supp. 2d at 261-62; cf. Reilly, 181 F.3d at 265 (plaintiff may recover both liquidated damages under New York Labor Law and pre-judgment interest "because [they] serve fundamentally different purposes"). However, there is an emerging trend towards denying a cumulative recovery of liquidated damages, because under recent amendments increasing liquidated damages from 25% to 100% and changing the standard of proof, the New York Labor Law liquidated damages provision now closely parallels the FLSA provisions. See Man Wei Shiu, 2014 WL 652355, at *13; Gortat v. Capala Bros., 949 F. Supp. 2d 374, 381-82 (E.D.N.Y. 2013). While the reasoning of these courts is persuasive that assessment of double liquidated damages is not warranted, since the plaintiff's application here is uncontested and involves the failure to pay even the minimum wage, I recommend following the majority view and awarding liquidated damages under both federal and state law.

Section 216(b) of the FLSA provides that an employer shall be liable to the employees who are not paid minimum wages or overtime wages "an additional equal amount as liquidated damages" unless the employer can show that it acted in good faith. 29 U.S.C. § 216(b). As the defendants here have defaulted, they have not shown they acted in good faith. See, e.g., Blue v. Finest Guard Servs, Inc., No. 09-CV-133, 2010 WL 2927398, at *11 (E.D.N.Y. June 24, 2010) (finding that a defendant's default, in itself, may suffice to support a claim for liquidated damages); Dong v. CCW Fashion Inc., No. 06-CV-4973, 07-CV-9741, 2009 WL

884680, at *4-5 (S.D.N.Y. Feb. 19, 2009). Since the federal minimum wage rate was lower than the New York minimum wage from May 8, 2009 to July 23, 2009, the calculation for liquidated damages under the FLSA for that time period must be calculated separately based on the lower federal rate. See Galeana v. Lemongrass on Broadway Corp., No. 10 CIV. 7270, 2014 WL 1364493, at *10 (S.D.N.Y. 2014); Gunawan v. Sake Sushi Rest., 897 F. Supp. 2d 76, 92 (E.D.N.Y. 2012). As to minimum wages, for the period from May 8, 2009 to July 23, 2009, defendants owe plaintiff $3.22 per hour worked ($6.55 - $3.33) for 72 hours per week for 11 weeks, or a total amount of $2,550.24. As to overtime wages, from May 8, 2009 to July 23, 2009, defendants owe plaintiff $3.275 per hour ($6.55 ÷ 2) for 32 hours per week for 11 weeks, or a total amount of $1,152.80. For subsequent periods, defendants owe plaintiff the same amount of unpaid minimum wages and overtime as computed above: $34,897.02 for unpaid minimum wages and $15,246.76 for unpaid overtime wages for July 24, 2009 to February 19, 2012.

For an offset of FLSA liquidated damages, plaintiff worked 2.8 years (146 weeks ÷ 52 weeks per year), and, therefore, the presumed number of days off is approximately 8 days (2.8 years x 3 days per year). The average value of plaintiff's FLSA liquidated damages claim for each day is $61.47 ($53,846.82 ÷ 876 days). Thus, the offset for FLSA liquidated damages claim is $491.76 ($61.47 x 8 days).

Plaintiff's liquidated damages claim under FLSA is summarized below:

LIQUIDATED DAMAGES UNDER FLSA			
Period	Unpaid FLSA Minimum Wages + Unpaid Overtime Wages	Liquidated Damage Rate	Liquidated Damages
05/08/09 to 07/23/09	$3,703.04	100%	$ 3,703.04
07/24/09 to 02/19/12	$50,143.78	100%	$ 50,143.78
SUBTOTAL			$ 53,846.82
OFFSET			$ 491.76
TOTAL			$ 53,355.06

Plaintiff is also entitled to liquidated damages for unpaid minimum wages, overtime wages and spread of hours pay under New York state law. As to those violations that occurred on or after November 24, 2009, the burden is on the employer to prove a good faith basis to believe that its underpayment of wages was in compliance with the law to avoid imposition of liquidated damages. See N.Y. Lab. Law § 663. Liquidated damages are calculated at a 25% rate prior to April 9, 2011 and at a 100% rate of the underpayments thereafter. See id. Thus, plaintiff is entitled to liquidated damages under the New York Labor Law for unpaid minimum wages, overtime wages and spread of hours pay in the amount of $37,472.49, including $19,471.73 up to April 8, 2011 (25% of $77,886.91) and $18,000.76 from April 9, 2011 to February 19, 2012.

As discussed previously, an offset is also warranted to plaintiff's liquidated damages under New York Labor Law. See Chopen Decl. at ¶ 16; Lucas Decl., Ex. 1. The average value of plaintiff's Labor Law liquidated damages claim for each day is $27.27 ($37,472.49 ÷ 1,374 days). Thus, the offset for New York Labor Law liquidated damages claim is $354.51 ($27.27 x 13 days).

Plaintiff's liquidated damages claim under the Labor Law are summarized below:

LIQUIDATED DAMAGES UNDER NYLL			
Period	Unpaid Minimum and Overtime Wages + Spread of Hours Pay	Liquidated Damage Rate	Liquidated Damage
10/01/07 to 04/08/09	$77,886.91	25%	$19,471.73
04/09/09 to 02/19/12	$18,000.76	100%	$18,000.76
SUBTOTAL			$37,472.49
OFFSET			$ 354.51
TOTAL			$37,117.98

Therefore, I recommend awarding plaintiff liquidated damages in the total amount of $90,473.04, including $53,355.06 under the FLSA and $37,117.98 under the New York Labor Law.

In sum, the plaintiff is entitled to the following damages under the FLSA and the New York Labor Law:

Minimum Wages	$ 59,635.87
Overtime Wages	$ 25,533.16
Spread of Hours Pay	$ 9,811.37
Liquidated Damages (FLSA)	$ 53,355.06
Liquidated Damages (NY)	$ 37,117.98
TOTAL DAMAGES	$185,453.44

6. Prejudgment Interest

Plaintiff also seeks prejudgment interest on unpaid wages owed and spread of hours pay under the Labor Law. Federal courts have long recognized that prejudgment interest may not be awarded in addition to liquidated damages for violations of the FLSA. Thomas v. iStar Fin., Inc., 652 F.3d 141, 150 n.7 (2d Cir. 2011); Brock v. Superior Care, Inc., 840 F.2d 1054, 1064 (2d Cir. 1988) (citing Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 714-16 (1945)). Since liquidated damages awarded under the FLSA for unpaid wages are designed to compensate employees for delays in payment, such damages are the functional equivalent of prejudgment interest.

However, the Second Circuit has also held that "[p]re-judgment interest and liquidated damages under the Labor Law are not functional equivalents" and thus may both be awarded for violations of state wage laws. Reilly, 181 F.3d at 265. As the Reilly court explained, "prejudgment interest" is meant "to compensate a plaintiff for the loss of use money," while, as discussed above, "liquidated damages under the Labor Law 'constitute a penalty.'" Id. (citations omitted). Because I have already found that plaintiff's claims for unpaid minimum wages, overtime wages and spread of hours pay are compensable under the Labor Law, plaintiff is entitled to prejudgment interest on those claims to the extent liquidated damages were not assessed pursuant to the FLSA.

Section 5001 of New York's Civil Practice Law and Rules governs the calculation of prejudgment interest for violations of the Labor Law. See Pavia, 2005 WL 4655383, at *8. Courts ordinarily apply a statutory interest rate of nine percent per annum in determining prejudgment interest under New York law. N.Y. C.P.L.R. § 5004. Section 5001(b) sets forth two acceptable methods of calculating prejudgment interest. First, interest may be calculated from "the earliest ascertainable date the cause of action existed." N.Y. C.P.L.R. § 5001(b). However, "[w]here . . . damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date." Id. To that end, courts have "wide discretion in determining a reasonable date from which to award pre-judgment interest." Conway v. Icahn & Co., 16 F.3d 504, 512 (2d Cir. 1994). Here, because plaintiff was denied spread of hours pay during his entire term of employment with defendants, this Court recommends using the latter calculation method. Although plaintiff suggests using November 15, 2009 as the midpoint, I find that December 20, 2009, the 115th week ending date of a 229 week long employment, is a more "reasonable intermediate date" as the midway point between the beginning and end of plaintiff's term of employment. See Pavia, 2005 WL 4655383, at *8; see also Gonsalez v. Marin, 12-CV-1157, 2014 WL 2514704, at *13 (E.D.N.Y. Apr. 25, 2014) (using the midpoint of plaintiff's employment as a reasonable intermediate date).

This Court also rejects plaintiffs' methodology of dividing periods of employment and using different midpoints for each period in calculating prejudgment interest. See Pl.'s Mem. at 19. Courts in this district typically use a single midpoint. See, e.g., Jemine v. Dennis, 901 F. Supp. 2d 365, 391 (E.D.N.Y. 2012); Callier v. Superior Bldg. Servs., Inc., No. 09-CV-4590, 2010 WL 5625906, at *4 (E.D.N.Y. Dec. 22, 2010); Said v. SBS Elecs., Inc., No. 08-CV-3067, 2010 WL 1270129, at *3 (E.D.N.Y. Apr. 1, 2010). The statute's clear and unambiguous language also supports use of a "single reasonable intermediate date." See N.Y. C.P.L.R. § 5001(b). Accordingly, I have calculated the prejudgment interest based on a single midpoint date, December 20, 2009.

Plaintiff is thus entitled to a 9% prejudgment interest award under N.Y. C.P.L.R. § 5001 on his unpaid minimum wages, overtime wages and spread of hours pay for which FLSA liquidated damages are not awarded. In addition, the offsets applied to plaintiff's unpaid minimum wages and overtime wages must be recalculated since plaintiff is only allowed to recover prejudgment interest of these two claims until May 8, 2009. From October 2007 to May 8, 2009, defendants owe plaintiff unpaid minimum wages of $22,283.07 and overtime wages of $9,271.88, respectively. During this period, plaintiff worked 1.6 years (83 weeks ÷ 52 weeks per year), and therefore the presumed number of days off is approximately 5 days (1.6 years x 3 days per year). The average value of plaintiff's unpaid minimum wages and overtime wages claims for each day are $44.75 ($22,283.07 ÷ 498 days) and $18.62 ($9,271.88 ÷ 498 days), respectively. Thus, the offsets for unpaid minimum wages and overtime wages principal are $223.75 ($44.75 x 5 days) and $93.10 ($18.62 x 5 days), respectively.

Accordingly, I recommend awarding prejudgment interest in the amount of $19,501.24 from December 20, 2009 through March 31, 2015 and at the rate of $10.12 per day thereafter until the entry of judgment. The calculation of plaintiff's prejudgment interest is summarized below:

Category	Principal	Per Diem	No. of Days from 12/20/09 to 3/31/15	Interest through 3/31/15
Minimum Wages (Before 05/08/09)	$22,283.07			
Offset (Minimum Wages)	$ 223.75			
Overtime Wages (Before 05/08/09)	$ 9,271.88			
Offset (Overtime Wages)	$ 93.10			
Spread of Hours Pay	$ 9,811.37			
TOTAL	$41,049.47	$10.12	1,927	$19,501.24

IV. **Attorneys' Fees**

The FLSA allows for an award of "reasonable" attorney's fees. See 29 U.S.C. § 216(b). Plaintiff bears the burden of proving the reasonableness of the fees sought. See Savoie v. Merchs. Bank, 166 F.3d 456, 463 (2d Cir. 1999).

The standard method for determining the amount of reasonable attorneys' fees is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," or a "presumptively reasonable fee." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, 522 F.3d 182, 188-90 (2d Cir. 2008); Chambless v. Masters, Mates & Pilots Pension Plan, 885 F.2d 1053, 1058-59 (2d Cir. 1989); see also Perdue v. Kenny A., 559 U.S. 542, 551-53 (2010) (discussing lodestar methodology). In reviewing a fee application, the district court must examine the particular hours expended by counsel with a view to the value of the work product of the specific expenditures to the client's case. See Lunday v. City of Albany, 42 F.3d 131, 133 (2d Cir. 1994); DiFilippo v. Morizio, 759 F.2d 231, 235 (2d Cir. 1985). If any expenditure of time was unreasonable, the court should exclude these hours from the calculation. See Hensley, 461 U.S. at 434; Lunday, 42 F.3d at 133. The court should thus exclude "excessive, redundant or otherwise unnecessary hours, as well as hours dedicated to severable unsuccessful claims." Quaratino v. Tiffany & Co., 166 F.3d 422, 425 (2d Cir. 1999). A party seeking attorneys' fees bears the burden of supporting its claim of hours expended by accurate, detailed and contemporaneous time records. N.Y. State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1147-48 (2d Cir. 1983).

A reasonable hourly rate is "the rate a paying client would be willing to pay," "bear[ing] in mind that a reasonable paying client wishes to spend the minimum necessary to litigate the case effectively." Arbor Hill, 522 F.3d at 190. The reasonable hourly rates should be based on "rates prevailing in the community for similar services of lawyers of reasonably comparable skill, experience, and reputation." Cruz v. Local Union No. 3 of IBEW, 34 F.3d 1148, 1159 (2d Cir. 1994) (citing Blum v. Stenson, 465 U.S. 886, 894 (1984)). Determination of the prevailing market rates may be based on evidence presented or a judge's own knowledge of hourly rates charged in the community. See Farbotko v. Clinton Cnty. of N.Y., 433 F.3d 204, 209 (2d Cir. 2005); Chambless, 885 F.2d at 1059. The "community" is generally considered the district where the district court sits. See Arbor Hill, 522 F.3d at 190.

Plaintiff seeks $32,200 in attorney's fees for the work of Scott A. Lucas at the hourly rate of $400. See Lucas Decl. at ¶¶ 5, 6. In his sworn declaration, Mr. Lucas states that he is a highly experienced wage and hour practitioner with 19 years of experience. See id. at ¶ 11.

The rate of $400 sought by plaintiff is at the high end of the range of rates received by similarly experienced attorneys in this district. As a preliminary matter, courts have found that the prevailing hourly rate for partners in this district is between $300 and $400. See, e.g., Konits v. Karahalis, 409 Fed. App'x 418, 422–23 (2d Cir. 2011) (affirming holding that the prevailing rates for experienced attorneys in the Eastern District of New York range from approximately $300 to $400 per hour); Jean v. Auto & Tire Spot Corp., No. 09-CV-5394, 2013 WL

2322834, at *6 (E.D.N.Y. May 28, 2013); Colon v. City of N.Y., No. 09-CV-0008, 09-CV-0009, 2012 WL 691544, at *21 (E.D.N.Y. Feb. 9, 2012) (approving rate of $350 per hour for solo practitioner); Concrete Flotation Sys., Inc. v. Tadco Constr. Corp., No. 07–CV–319, 2010 WL 2539771, at *4 (E.D.N.Y. March 15, 2010); Luca v. Cnty. of Nassau, 698 F. Supp. 2d 296, 301-02 (E.D.N.Y. 2010) (collecting cases); see also Cho v. Koam Med. Servs. P.C., 524 F. Supp. 2d 202, 207 (E.D.N.Y. 2007) (observing in FLSA case that "[o]verall, hourly rates for attorneys approved in recent Eastern District of New York cases have ranged from $200 to $350 for partners, $200 to $250 for senior associates, $100 to $150 for junior associates, and $70 to $80 for legal assistants") (citations omitted). While Mr. Lucas has considerable experience as a labor and employment lawyer, his background is not as extensive as those "highly experienced and impeccably credentialed" partners who "have been awarded rates on the higher end of the attorneys' fees spectrum." Ueno v. Napolitanto, No. 04-CV-1873, 2007 WL 1395517, at *9 (E.D.N.Y. May 11, 2007) (awarding rates of $450, $400, and $350 for attorneys who have practiced for 42, 21, and 29 years respectively and collecting cases). The small size of his law firm is also a factor in determining a reasonable hourly rate. See GuideOne Specialty Mut. Ins. Co. v. Congregation Adas Yereim, No. 04–CV–5300, 2009 WL 3241757, at *4 (E.D.N.Y. Sept. 30, 2009).

Also, "the nature of representation and type of work involved in a case are critical ingredients in determining the 'reasonable' hourly rate." Arbor Hill, 522 F.3d at 184 n.2 (citations omitted). The nature of the work performed in this matter was relatively straightforward and no novel or complex issues were raised by plaintiff. An award of $350 per hour is consistent with recent attorneys' fee awards in FLSA cases by this Court and other judges in this district. See Cuevas v. Ruby Enters. of N.Y., Inc., No. 10–CV–5257, 2013 WL 3057715, at *2 (E.D.N.Y. June 17, 2013) (awarding partners with 16 years and 18 years of experience $350 per hour); Jean, 2013 WL 2322834, at *7 (awarding $350 to attorney with 15 years of experience as a litigator); Gayle v. Harry's Nurses Registry, Inc, No. 07-CV-4672, 2013 WL 5502951, at *9 (E.D.N.Y. Aug. 26, 2013) (reducing $400 hourly rate to $350 per hour in FLSA case for partner with 16 years of experience). Thus, I recommend reducing Mr. Lucas's hourly rate from $400 per hour to $350 per hour.

Plaintiff's fee request is based on counsel having spent 80.5 hours litigating this case. See Lucas Decl. at ¶ 5. Based on my review of counsel's contemporaneous time records, although the documentation of the hours billed is sufficient, the time spent is excessive. Defendants briefly appeared in the action, and did not respond to plaintiff's motion for default judgment. Counsel expended approximately 26 hours prior to filing a complaint that was not unusual or complex. Accordingly, this Court finds that a reduction in the hours claimed is warranted.

Some of counsel's entries are unspecific and unclear about the connection to the proceedings in this action. Counsel billed a total of 5.6 hours for unspecified correspondence and telephone calls among Mr. Lucas, associate counsel William Sanyer and paralegal Laura DeJesus. The Second Circuit has upheld a district court's reduction in hours in light of "concerns regarding unspecified conferences, telephone calls, email correspondence, and reviews." Matusick v. Erie Cnty. Water Auth., 757 F.3d 31, 64-65 (2d Cir. 2014) (internal quotation marks and citations omitted); see also Sheet Metal Workers Nat. Pension Fund v. Evans, No. 12-CV-3049, 2014 WL 2600095, at *10 (E.D.N.Y. June 11, 2014) (applying a "20% [across-the-board] reduction for vagueness, inconsistencies, and other deficiencies in the billing records") (quoting Kirsch v. Fleet St., Ltd., 148 F.3d 149, 173 (2d Cir. 1998)). Thus, I recommend deducting the unspecified 5.6 billing hours.

Furthermore, counsel spent 39.3 hours on this action after the defendants' answers were stricken. From that point forward, plaintiff's counsel should not have spent a substantial amount of time since this case does not involve complex issues. The instant damage submissions should have required no more than 20 hours. Although counsel has removed 9.5 hours for March 14, 2014 (Lucas Decl. at ¶ 5), I nonetheless recommend deducting an additional 9.8 hours billed after January 15, 2014. This leaves 65.2 hours to be compensated or approximately 80% of the hours claimed. See Kirsch v. Fleet Street Ltd., 148 F.3d 149, 173 (2d Cir. 1998) (quoting Carey, 711 F.2d at 1146) ("the court has discretion simply to deduct a reasonable percentage of the number of hours claimed 'as a practical means of trimming fat from a fee application.'"); Rotella v. Board of Educ., No. 01-CV-0434, 2002 WL 59106, at *3–4 (E.D.N.Y. Jan. 17, 2002) (applying percentage reduction to fees of several attorneys for excessive and redundant billing); Quinn v. Nassau City Police Dep't, 75 F. Supp. 2d 74, 78 (E.D.N.Y. 1999) (reducing one attorney's fees by 20% and another's by 30% for unnecessary and redundant time); Perdue v. Citv Univ. of N.Y., 13 F. Supp. 2d 326, 346 (E.D.N.Y. 1998) (imposing a 20% reduction for redundancy); see also Gunawan, 897 F. Supp. 2d at 95-96 (deducting all but 56.5 hours spent in FLSA case where defendant defaulted following completion of discovery and briefing of motion for summary judgment).

Thus, I recommend awarding fees of $22,820 (65.2 hours x $350 per hour).

V. Costs

Plaintiff further requests an award of $515 for costs incurred during the course of this litigation, consisting of the court filing fee and service of process fees. As a general matter, a prevailing plaintiff in an action under the FLSA is entitled to recover costs from the defendant. See 29 U.S.C. § 216(b). However, only those costs that are tied to "identifiable, out-of-pocket disbursements" are recoverable. Castellanos v. Mid Bronx Cmty. Hous. Mgmt. Corp., No. 13-CV-3061, 2014 WL 2624759, at *8 (S.D.N.Y. June 10, 2014) (quoting Kuzma v. IRS, 821 F.2d 930, 933-34 (2d Cir. 1987)). Since court filing and service of process fees are routinely recoverable, I recommend awarding plaintiff costs in the amount requested. Cf. 28 U.S.C. § 1920.

CONCLUSION

For the reasons stated above, I respectfully recommend that plaintiff's motion for default judgment be granted against Olive Vine, Inc. and Zaid Demis in the amount of $228,289.68, consisting of unpaid minimum wages of $59,635.87, overtime wages of $25,533.16, spread of hours pay of $9,811.37, liquidated damages of $90,473.04, interest of $19,501.24 through March 31, 2015 and at a daily rate of $10.12 thereafter until the entry of judgment, attorneys' fees of $22,820 and costs of $515. I further recommend dismissing defendants William Doe and Meham Doe from this action without prejudice.

A copy of this report and recommendation will be filed electronically and sent by mail to the defendants on this date. Objections to the Report and Recommendation must be filed with the Clerk of Court, with a copy to Judge Garaufis, by March 30, 2015. Failure to file objections within the time specified waives the right to appeal. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

SO ORDERED.

Dated: Brooklyn, New York
March 13, 2015

/s/
MARILYN D. GO
UNITED STATES MAGISTRATE JUDGE